

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK HOVILA,

Plaintiff,

v.

TWEEN BRANDS, INC.,

Defendant.

No. C09-491 RSL

**DEFENDANT'S MOTION FOR 28  
U.S.C. § 1292(b) CERTIFICATION  
AND STAY OF PROCEEDINGS  
PENDING APPEAL**

**NOTE ON MOTION CALENDAR:  
MAY 7, 2010**

**I. RELIEF REQUESTED**

Tween Brands, Inc. ("Tween") moves for: (1) certification of this Court's April 7, 2010 order denying summary judgment on Plaintiff's state law claims for interlocutory appeal under 28 U.S.C. § 1292(b), and (2) a stay of all further proceedings in this Court pending the filing of a request for permission to appeal in the U.S. Court of Appeals for the Ninth Circuit, the disposition of that request, and the disposition of any appeal.

Certification for interlocutory appeal is warranted. The Court's order denying summary judgment on Plaintiff's state law claims involves controlling questions of law concerning whether the Telephone Consumer Protection Act (the "TCPA") preempts Plaintiff's state law claims and whether the TCPA should serve as a guide in interpreting

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1 Washington's Automatic Dialing and Answering Devices Act (the "ADADA"). There is  
 2 substantial ground for difference of opinion on these questions, and an immediate appeal from  
 3 the Court's order will materially advance the ultimate termination of this litigation.

4 A stay of further proceedings in the Court pending the filing of a request for  
 5 permission to appeal, the disposition of that request, and the disposition of any appeal  
 6 permitted by the appellate court is appropriate because such a stay will conserve judicial and  
 7 litigation resources and will not unduly prejudice any party.

8 This Motion is based the pleadings and records on file in this action.

## 9 II. BACKGROUND

10 Plaintiff filed his Complaint against Tween in March of 2009, alleging that he  
 11 received a pre-recorded telephone call from the Defendant in violation of the TCPA, the  
 12 ADADA, the Washington Consumer Protection Act, RCW 80.36.400, and the Washington  
 13 Declaratory Judgment Act, RCW 7.24.010. Complaint at ¶¶ 3.1-3.18. Tween then moved for  
 14 summary judgment on September 10, 2009. (Dkt. No. 11).

15 Under the TCPA and the regulations promulgated by the Federal Communications  
 16 Commission ("FCC") under the TCPA's authority, interstate automatic calls made either  
 17 (1) with "prior express consent of the called party," or (2) "within the eighteen (18) months  
 18 immediately" following an "established business relationship" ("EBR") are not prohibited,  
 19 and no sanctions apply under either of those conditions. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R.  
 20 § 64.1200(f)(4). Because this Court expressly found that Plaintiff had an EBR with the  
 21 Defendant, it granted summary judgment on Plaintiff's TCPA claim in its April 7, 2010 order.  
 22 Dkt. No. 49, p. 9. As a result, Plaintiff's TCPA claim has been completely adjudicated. *Id.*

23 Washington's ADADA, on the other hand, prohibits unsolicited automatic calls for the  
 24 purpose of commercial solicitation even where the defendant has an EBR with the plaintiff.  
 25 RCW 80.36.400(2). Although Defendant argued that the TCPA preempts the ADADA and  
 26 that Plaintiff's state law claims were therefore barred, this Court found otherwise. Dkt. No.

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49, p. 21. This Court further found that the TCPA should not be used to interpret the ADADA and that, as a result, the TCPA's interpretation of "unsolicited" is inapplicable. *Id.*, p. 22. Accordingly, this Court was unable to find that Plaintiff consented to receiving Defendant's calls and denied summary judgment on Plaintiff's state law claims. *Id.*, p. 23. Defendant now respectfully requests that the Court certify its order denying summary judgment on Plaintiff's state law claims for interlocutory appeal under 28 U.S.C. § 1292(b).

### III. ARGUMENT

#### A. **This Court Should Certify its Order Denying Summary Judgment on Plaintiff's State Law Claims for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b).**

The Court's order denying summary judgment on Plaintiff's state law claims satisfies all the requirements of 28 U.S.C. § 1292(b). The order: (1) involves a controlling question of law, (2) on which substantial ground for difference of opinion exists, and (3) the resolution of which will materially advance the termination of the litigation.

##### 1. The Court's Order Involves a Controlling Question of Law Concerning Whether the Telephone Consumer Protection Act Preempts Plaintiff's State Law Claims.

Courts assess whether an order involves a "controlling question of law" by examining whether immediate appellate review could "avoid protracted and expensive litigation" and "materially affect the eventual outcome of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). Further, the issue must be a "pure question of law, not a mixed question of law and fact or an application of law to a particular set of facts." *Marsall v. City of Portland*, No. CV-01-1014-ST, 2004 WL 1774532, \*2 (D. Or. 2004) (citations omitted).

Under this standard, the Court's order denying summary judgment on the state law claims patently involves controlling questions of law. Because this Court has already granted summary judgment on Plaintiff's TCPA claim, a Ninth Circuit reversal of this Court's order on preemption would dismiss Plaintiff's action in its entirety. Or, if the Ninth

1 Circuit finds that the TCPA should be used to interpret the ADADA, which would mean that  
 2 Plaintiff consented to receiving Defendant's calls, Plaintiff's remaining claims would  
 3 similarly be dismissed. Thus, an appellate reversal of the Court's decision would terminate  
 4 the case and avoid "protracted and expensive litigation."

5 Furthermore, these issues are "pure questions of law" and are not premised on the  
 6 underlying facts of the case. The facts of Plaintiff's case have no bearing on whether the  
 7 TCPA preempts the ADADA nor do they bear on whether the TCPA is the appropriate  
 8 federal guide for interpreting the ADADA. Accordingly, these issues are controlling  
 9 questions of law.

10 2. There is a Substantial Ground for Difference of Opinion.

11 a. *There is Substantial Ground for Difference of Opinion as to Whether*  
 12 *the TCPA Preempts the ADADA.*

13 Section 1292(b) requires the proponent of the appeal to demonstrate a substantial  
 14 ground for a difference of opinion. *Cement*, 673 F.2d at 1026. Beyond disagreeing with the  
 15 district court's decision, the proponent must "make some greater showing" that there is a  
 16 difference of opinion on the legal issue. *Ass'n of Irrigated Residents v. Fred Schakel Dairy*,  
 17 634 F. Supp. 2d 1081, 1090 (E.D. Cal. 2008). A substantial ground for difference of opinion  
 18 is present where there are conflicting opinions within the district courts. *Lucas v. Bell Trans*,  
 19 No. 2:08-cv-01792-RCJ-RJJ, 2009 WL 3336112, \*4 (D. Nev. Oct. 14, 2009).

20 In this case, Defendant can easily demonstrate that there is a substantial ground for  
 21 difference of opinion concerning the preemptive effect of the TCPA on Plaintiff's state law  
 22 claims. As this Court stated in its April 7, 2010 order, "[c]ourts that have interpreted the  
 23 TCPA's savings clause have come to different conclusions." Dkt. No. 49, p. 13. Further,  
 24 Judge Zilly of this Court noted that "[c]ourts have disagreed" on whether the TCPA  
 25 preempts the ADADA. *Williams v. MCIMetro Access Transmission Servs.*, No. C08-82TSZ,  
 26 *see* Tr. of Proceedings, at 74:20.

1 Defendant argued in its motion for summary judgment and in its reply to Plaintiff's  
 2 opposition thereto that "[s]ection 151 of the FCA [Federal Communications Act of 1934],  
 3 together with the later decisions interpreting the same, generally allocate to the FCC the right  
 4 to govern interstate telecommunications." *Chamber of Commerce of U.S. v. Lockyer*, No.  
 5 2:05-CV-2257MCEKJM, 2006 WL 462482, at \*7 (E.D. Cal. Feb. 27, 2006). And, because  
 6 it is undisputed that the calls were interstate and "states do not have jurisdiction over  
 7 interstate calls[.]" Plaintiff's state law claims must fail. *Foxhall Realty Law Offices, Inc. v.*  
 8 *Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 437 (2d Cir. 1998) (citing S. Rep. No. 178,  
 9 102nd Cong., 1st Sess. 1, 1 (1991), U.S. Code Cong. & Admin. News (1968)).

10 Defendant further argued that the "ultimate touchstone" of preemption is "the purpose  
 11 of Congress[.]" and thus this Court must consider whether Congress intended federal law to  
 12 preempt state law. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). Legislative history  
 13 confirms that states are only permitted to issue regulations for intrastate calls. *See* 137 Cong.  
 14 Rec. S18, 781-02 (Nov. 21, 1991) (statement of Sen. Hollings) (stating that "pursuant to the  
 15 general preemptive effect of the [FCA], State regulation of interstate communications,  
 16 including interstate communications initiated for telemarketing purposes, is preempted.").

17 Defendant also argued that Plaintiffs' state law claims were expressly preempted by  
 18 the TCPA, which provides that the states may only promulgate regulations that are more  
 19 restrictive than those in the TCPA on *intrastate* telephone calls. 47 U.S.C. § 227(e)(1). The  
 20 ADADA, which is more restrictive than the TCPA in that it fails to provide the EBR exception  
 21 applicable under the TCPA, is preempted. Moreover, Defendant contended that the ADADA  
 22 is preempted under conflict preemption, as it not only omits the EBR exception, but it also  
 23 interferes with the TCPA's intent to promote legitimate business communications.

24 There is considerable authority to support Defendant's position that the TCPA has a  
 25 preemptive effect. The *Lockyer* court found that a California regulation, which was  
 26 substantially identical to Washington's ADADA, was preempted by the TCPA because it

1 unconstitutionally conflicted with congressional purposes in regulating and fostering interstate  
 2 commerce. 2006 WL 462482, at \*8. That court found that the state law was preempted  
 3 because it omitted the crucial exception provided by the TCPA for telephone calls or fax  
 4 transmissions to parties having an EBR with the soliciting entity. *Id.*

5 Further, Washington's Western District has found that the ADADA conflicts with, and  
 6 is therefore preempted by, the TCPA. *See Williams v. MCIMetro Access Transmission Servs.*,  
 7 No. C08-82TSZ, Docket Nos. 42, 58, 62, 74. Judge Zilly noted that the ADADA conflicts  
 8 with the TCPA because the Washington statute omits the EBR exception. *See Tr. of*  
 9 *Proceedings*, at 30:18-20. He further found that the TCPA's savings clause is ambiguous and  
 10 that "the statute is more narrow than the plaintiffs suggest, and ... federal preemption is  
 11 broader than the plaintiffs would like." *Id.*, at 75:5-6, 78:17-19. Accordingly, Judge Zilly  
 12 held that the TCPA preempted the state statute. *See id.*, at 65:17-73:21.

13 On the other hand, this Court in its April 7, 2010 order found that the TCPA does not  
 14 preempt the ADADA. In contrast to Judge Zilly's opinion, this Court stated that  
 15 Defendant's interpretation of the federal presence in telecommunications is "too broad." *See*  
 16 *Dkt. No. 49*, p. 9. In further divergence from Judge Zilly's opinion, this Court found that the  
 17 ADADA is "expressly saved from preemption" under the TCPA's savings clause. *Id.* at 14.  
 18 Similarly, Judge Robart found in *Palmer v. Sprint Nextel Corp.* that the TCPA does not  
 19 preempt the ADADA, for reasons largely similar to this Court's reasoning. No. C09-  
 20 1211JLR, 2009 WL 4730851, \*7 (W.D. Wash. Dec. 7, 2009).

21 Accordingly, the district courts in the Ninth Circuit are split as to whether state  
 22 statutes regulating automatic telephone calls are preempted by the TCPA. Because the Court  
 23 of Appeals has not ruled on this issue, this case is precisely the type of situation in which  
 24 section 1292(b) should be utilized. Without appellate guidance, businesses are unclear as to  
 25 what telephone calls are acceptable and the district courts' dockets continue to be clogged  
 26 with cases litigating this very issue. Such guidance would also be useful to the Courts in this

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1 district where there are many pending cases that are substantially similar to this case, at least  
2 three of which are assigned to this Court.<sup>1</sup>

3 *b. There is Substantial Ground for Difference of Opinion as to Whether*  
4 *Courts Should Look to the TCPA to Interpret the ADADA.*

5 “[A]n issue can be a controlling question of law for which there is a substantial ground  
6 for difference of opinion when it is ‘difficult and of first impression.’” *Marsall*, 2004 WL  
7 1774532 at \*5 (internal citations omitted). The Court’s decision that the TCPA should not be  
8 used to interpret the ADADA was precisely that—a difficult issue of first impression.

9 Defendant argued that even if Washington law applied to interstate calls, Plaintiff’s  
10 consent to receiving calls precluded his claims under Washington law. Washington prohibits  
11 “the unsolicited initiation of a telephone conversation for the purpose of encouraging a person  
12 to purchase property, goods, or services.” RCW 80.36.400(1)(b) (emphasis added). There is  
13 no law interpreting the meaning of “unsolicited” under this statute. However, when  
14 Washington law is silent, courts look to analogous federal law. *Beal v. City of Seattle*, 134  
15 Wn.2d 769, 777 (1989). Defendant contended that the TCPA is the parallel federal law and  
16 that the Court should look to it for guidance in interpreting the ADADA. The TCPA defines  
17 “unsolicited advertisement” as being “without that person’s prior express invitation or  
18 permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). A call is not unsolicited if the  
19 recipient has given permission. *Id.* Persons who knowingly release their phone numbers  
20 have in effect given their invitation or permission to be called at the number which they have  
21 given. 7 FCC Rcd. 8752 ¶ 31 (1992) (citing House Report, 102-317, 1st Sess., 102nd Cong.  
22 (1991), at p. 13, noting that in such instances “the called party has in essence requested the  
23 contact by providing the caller with their telephone number for use in normal business

24 <sup>1</sup> See, e.g., *Global Educ. Servs., Inc. v. Intuit Inc.*, No. C09-0944RSL (W.D. Wash.) (pending before this Court);  
25 *Clark v. Payless ShoeSource, Inc.*, No. 2:09-cv-00915-JCC (W.D. Wash.); *Cabbage v. The Talbotts Inc.*, No.  
26 2:09-cv-00911-BHS (W.D. Wash.); *Hartman v. Comcast Bus. Commc’ns*, No. 2:10-cv-00413-RSL (W.D.  
Wash.) (pending before this Court); *Spafford v. Comcast Corp.*, No. 2:10-cv-00563-RSL (W.D. Wash.) (pending  
before this Court).

communications”). Based on the meaning of “unsolicited” under federal law, Plaintiff’s decision to give Defendant his telephone number at the point of sale excludes Defendant’s calls from the state prohibition against unsolicited calls. Thus, the Plaintiff’s state law claims should fail.

This court ruled, however, that the “federal and state statutes are not sufficiently similar for the Court to incorporate TCPA definitions in to the [ADADA.]” Dkt. No. 49, p. 22. The Court reasoned that the ADADA was enacted solely for consumer protection, whereas the TCPA was enacted for other purposes as well as for consumer protection. Defendant argues that the TCPA is sufficiently similar to the ADADA and is the correct guide for interpreting the ADADA. Both laws regulate the use of automatic calls and both were designed with consumer protection in mind. Because this is a difficult issue of first impression, and there is a substantial ground for differing opinions, this decision should be certified for appellate review under section 1292(b).

3. An Immediate Appeal of the Court’s Order Will Materially Advance the Termination of this Litigation.

“Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit.” *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). Accordingly, section 1292(b) requires a finding that an immediate appeal may materially advance the litigation. *Cement*, 673 F.2d at 1026. “This factor is linked to whether an issue of law is ‘controlling’ in that the Court should consider the effect of a reversal by the court of appeals on the management of the case.” *Ass’n of Irrigated Residents*, 634 F. Supp. 2d at 1092.

Here, an immediate appeal of the Court’s order will resolve the threshold and potentially case-dispositive issues of whether the TCPA preempts Plaintiff’s state law claims and whether the TCPA should be used to interpret the ADADA. Interlocutory appellate



1 review of these discrete issues now will ensure that the issues are resolved definitively  
 2 *before* the parties and this Court are required to expend substantial time, effort and expense  
 3 on discovery, class certification, and other phases of litigation (including a possible trial on  
 4 the merits).

5 In other words, interlocutory appeal will ensure that tremendous resources of the  
 6 parties and the Court are not wasted. Such potential savings are precisely what section  
 7 1292(b) was designed to accomplish. This potential savings is especially important here  
 8 because the litigation is at an early stage where the parties have yet to engage in any class  
 9 discovery or certification proceedings. Accordingly, it would be better for all parties  
 10 concerned to have these matters resolved now, as opposed to some time in the distant future  
 11 after proceedings will surely have consumed a significant amount of the parties' time and  
 12 resources.

13 **B. A Stay of District Court Proceedings is Necessary to Conserve the Resources of**  
 14 **the Parties and the Courts.**

15 Section 1292(b) expressly contemplates that a district court certifying an order for  
 16 interlocutory appellate review may stay the district court proceedings. In considering  
 17 whether to issue a stay, the district court has broad authority to "promote economy of time  
 18 and effort for itself, for counsel, and for litigants." *See Filtrrol Corp. v. Kelleher*, 467 F.2d  
 242, 244 (9th Cir. 1972); *Ass'n of Irrigated Residents*, 634 F. Supp. 2d at 1094.

19 A stay of district court proceedings is especially appropriate in cases, such as this  
 20 one, where a reversal by the appellate court will result in dismissal or termination of the  
 21 entire litigation, as denying a stay would result in a waste of resources. *See Ass'n of*  
 22 *Irrigated Residents*, 634 F. Supp. 2d at 1095; *see also Advanced Analogic Techs., Inc. v.*  
 23 *Linear Tech. Corp.*, No. C-06-00735, 2006 WL 2850017, at \*3 (N.D. Cal. Oct. 4, 2006)  
 24 (staying action pending resolution of interlocutory appeal because a reversal of the district  
 25 court's order will result in dismissal of plaintiff's declaratory relief cause of action as well as  
 26

1 defendant's conditional counterclaims and thus a stay "will conserve the resources of the  
2 parties and the Court").

3 A stay of this Court's proceedings pending Defendant's filing of a petition for  
4 permission to appeal in the Ninth Circuit and disposition of that petition (and any appeal  
5 permitted by the appellate court) will preserve the ability of the appellate court to  
6 meaningfully review this Court's order and conserve the resources of the parties and the  
7 judicial system. Moreover, it will not unduly prejudice any party. If the appellate court  
8 denies Defendant's petition for review, the stay will be brief. If the appellate court grants  
9 Defendant's petition for review, a stay pending disposition of the permitted appeal will be all  
10 the more appropriate, as the only issue remaining in the case will be on appeal, and litigating  
11 that claim in the district court would be a waste of resources.

12 Further, a stay will have little downside to the named Plaintiff, whether or not this  
13 Court's order were reversed on appeal. This is a factually simple case, and it is not the type  
14 of situation in which witness availability or memory would be jeopardized if the case were  
15 stayed. Plus, at this time, no class has been certified, and there is only one Plaintiff  
16 participating in the case. The ADADA affords only money damages, set by statute at \$500  
17 per telephone call. RCW 80.36.400(3). As a result, whether or not the Plaintiff ultimately  
18 succeeds in this case, he stands to gain only minor statutory damages.

19 Moreover, "[t]he opportunity to achieve appellate resolution of an issue important to  
20 other similarly situated [defendants] can provide an additional reason for certification[.]"  
21 *Ass'n of Irrigated Residents*, 634 F. Supp. 2d at 1093. As this Court noted during oral  
22 argument on the summary judgment motion, there are many pending cases that are  
23 substantially similar to this case (*see* footnote one above). As the Ninth Circuit has not yet  
24 ruled on this issue, appellate guidance is appropriate.

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#### IV. CONCLUSION

An immediate appeal of the Court's order denying summary judgment on Plaintiff's state law claims will allow the parties to resolve the threshold and potentially case-dispositive issues of whether the TCPA preempts Plaintiff's state law claims and whether the Court should look to the TCPA to interpret the ADADA. Given the importance of these issues to the outcome of the litigation, the substantial ground for difference of opinion shown above, and the judicial and litigation resources that can be conserved by an immediate appeal, certification under 28 U.S.C. § 1292(b) is warranted. Moreover, these same factors support a stay of further proceedings pending the filing and disposition of a petition to appeal and the disposition of any appeal allowed by the appellate court.

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By /s/ Barbara J. Duffy

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 2010, I caused to be served a copy of the foregoing Defendant's Motion for 28 U.S.C. § 1292(b) Certification and Stay of Proceedings Pending Appeal on the following person(s) in the manner indicated below at the following addresses:

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☐ by Electronic Mail  
☐ by Facsimile Transmission  
☐ by First Class Mail  
☐ by Hand Delivery  
☐ by Overnight Delivery

/s/ Sharon R. Olson  
Sharon R. Olson

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